

July 24, 2015

The Honorable Greg Walden
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Walden:

The FCC recently published in the Federal Register a Telephone Consumer Protection Act Declaratory Rule and Order (Rule). Unfortunately the Rule increases challenges and economic risks for businesses trying to communicate consumer friendly content. Modifying the Telephone Consumer Protection Act in four key areas would still keep strong protections for consumers while making it more efficient and effective for our company, CarePayment, and our provider clients to communicate with patients about consumer-friendly payment options. Affordable patient financing, such as our credit lines at 0.00% APR for the life of the account with no hidden fees or impact on consumer credit scores, enables people to receive necessary care while helping them avoid the negative consequences of delinquent medical debt. The use of efficient calling techniques would make it easier to reach more patients who could benefit from these payment programs.

Here are our specific concerns about the current Rule:

No Distinction between Telemarketing Calls and Informational Calls

The new Rule does not adequately distinguish between *telemarketing calls* (that do not have a direct nexus with a product or services that the consumer already has received from a business) and *informational calls* that are associated with the product or service, like payment options to enable patients to more affordably retire their medical bills.

- No distinction in terms of the restriction on calls to wireless numbers;
- TCPA restrictions on “autodialed, artificial-voice, and prerecorded-voice calls” made by “any automatic telephone dialing system” to mobile phones “**apply equally** to telemarketing and informational only calls.”

Healthcare Exception

While the healthcare exception (which the FCC outlined in the new rules) is advantageous for providers and patients, it does not go far enough by extending the exception to permit use of autodialers and other technology-based means, like text messaging, to inform patients about matters inextricably linked with their medical care. CarePayment frequently hears from patients that learning about payment options upfront or shortly after treatment gives them peace of mind that the costs of such care will not cripple their budget.

- Exemption for healthcare treatment:
 - The FCC granted exemption to use autodialers and prerecorded messages on free-to-end-user calls for which there is exigency and that have a healthcare purpose, specifically—appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.

- Calls that include telemarketing, solicitation, or advertising content, or that include accounting, billing, debt collection, or other financial content are not exempt, so patient consent is required for those calls using autodialers and pre-recorded messages.
- If hospitals or their third-party associates could use autodialers and pre-recorded messages to not only inform patients about appointment and exam times and other specific medical care elements, but also about matters associated with their medical bills, patients would have more useful information for making decisions related to their care.
- Hospitals or their third party associates could provide patients with “soup to nuts” information about their care and post-care matters; autodialers and pre-recorded messages are often the most efficient and successful way to inform patients and facilitate a better experience for them overall.
- We recommend that the FCC expand this exception to permit use of autodialers and pre-recorded messages to address these financial matters related to medical care and handling of bills.

Definition of Autodialer

The Commission declined to provide a bright-line definition of “autodialer.”

- The Commission rejected arguments by petitioners that it should adopt a standard requiring that an autodialer have the present ability to store or produce telephone numbers to be called, using a random or sequential number generator; instead, the Commission adheres to the “capacity” test for an autodialer.
- The Commission reiterated that “the capacity of an autodialer is not limited to its current configuration but also includes its potential future functionalities.”
- Unfortunately, the Commission did not describe in detail what specific type or degree of modification would be necessary for a device to not be deemed an autodialer.
- The only safe harbors the Commission provided were exceptionally unhelpful; for example, it found that—a rotary phone is not an autodialer and neither is a “handset with the mere addition of a speed dial button; it leaves open that smart phones are potentially deemed autodialers.
- Placing calls using methods that require human intervention should be granted safe harbor.

Revoking Consent

A called party may revoke previously given prior consent at any time through any reasonable means; a caller may not limit the manner in which revocation can occur.

- According to the FCC, “[c]onsumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities.”
- The TCPA did not contain language specifying the means of opting out, in contrast to the Fair Credit Reporting Act.
 - According to the FCC, allowing additional restrictions on revoking consent “would place significant burden on the called party who no longer wishes to receive such calls, which is inconsistent with the TCPA.”
 - The Commission said “[a]llowing oral consent does not put defendant callers at a disadvantage; callers simply need to continue to maintain proper business records tracking consent.”
- Our opinion is that this places an unfair burden on businesses to manage an opt-out process, especially, for instance, in the context like ours, where a patient goes into the hospital to pay a bill and orally revokes consent; this revocation would require ongoing communication between hospital systems about revocations and service providers, with timing delays that are onerous and unfair to businesses.

- The Commission should allow reasonable limitations on revocation means—e.g., mandate that all revocations go to specific phone numbers, mail or email addresses to provide a manageable method for tracking purposes.

Treatment of Calls to Reassigned Numbers

The Commission states that callers are liable for autodialed or prerecorded calls to reassigned wireless numbers when the current subscriber or customer user of the number has not consented; the Commission takes the position that caller best practices can facilitate the detection of reassignment before calls are made.

- The Commission rejected the “intended called party” standard, fearing that “unwitting recipients of reassigned numbers might face a barrage of telemarketing voice calls and texts along with debt collection calls.”
- The Commission adopted the position taken by the Chairman in his TCPA fact sheet that callers were limited to one call or message to a reassigned number, regardless of whether the caller reached anyone or received a reply to that call or message (essentially a “free pass,” although it is more of a free “attempt”).
- The Commission’s position is that a single call, even one that does not succeed in reaching a consumer with a reassigned number and being informed that the caller did not reach the intended called party, is sufficient for the caller to have at least “constructive knowledge” that the number has been reassigned.
- This decision poses clear challenges for calling parties because there does not exist a 100% accurate database of reassigned numbers, as callers may not learn from an initial call or message that the number has been reassigned; it also opens the door for rampant litigation because entities do not get more than the one free attempt for calling a misdialed number.
- Businesses are facing an unfair and substantial economic risk of expensive lawsuits and regulatory fines even while exercising best practices to conform to the Rule. Consumers should bear some responsibility for mitigating concern of repeat calls by being required to inform callers that they have reached an unintended party, a cell phone for which no consent exists, or a land line for which no consent exists. Instead, consumers have financial incentives not to inform callers they have reached an unintended party or a cell line as each call can result in financial rewards of up to \$1,500.

VOIP Concerns

The Commission did not discuss:

- VOIP issues (i.e., land line ported to VOIP, which porting carries risk of TCPA violations, despite no notice of the porting).
- Calls ported from land lines (which lines do not require prior express consent) to a wireless line; this situation creates unfair risk of a TCPA violation without a means to mitigate/avoid such risk; when calling a landline consent is not required, but the if consumer ports the landline to a wireless or VOIP line, then a caller risks violating the TCPA prohibition on using an autodialer to call such number even though no comprehensive, real-time data base exists to scrub such numbers and put callers on notice that numbers were ported.

Please consider the issues above in your review. Representatives from CarePayment are happy to provide more information or answer any questions the Committee may have with regard to our concerns. We at CarePayment appreciate your attention to this matter.